SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 337.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Appellant*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal from the United States District Court for the District of Columbia.

BRIEF OF RAILROAD INTERVENORS IN REPLY TO BRIEF FOR THE UNITED STATES.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its brief for the United States, the Department of Justice asks this Court to reverse the judgment which the Department took the lead in procuring in the court below.

Nowhere in its brief does the Department undertake to justify its complete change of position here from that which it occupied below.

In its brief the Department describes the construction which the Commission and the court below have given the statute here involved as "an absurd interpretation" (p. 4). Yet in the court below the Department argued strenuously in favor of the interpretation which it now calls absurd. It took the lead in urging the court below to adopt that interpretation.[1] Having been successful in that effort, and having procured a judgment embodying the interpretation which it sought, the Department now asks this Court to adopt a wholly contrary interpretation and to reverse that judgment.

In the answer filed in this cause on behalf of the United States by the Department of Justice, it was alleged:

> "Defendant denies that said order[2] is invalid for the reasons set forth by plaintiff, or for any reason, and alleges that said order was, as the Commission found, in exact accordance with the Commission's power as delineated and specified in the second sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U. S. C. 5(2)(f)). Defendant alleges that the circumstance that the terminal will not be completed until after 5 years, while the protective period of 4 years will thus have elapsed before the impact upon the employees of the adverse effect resulting from the transactions approved by the Commission, is a circumstance regarding which the employees and carriers are free to make a voluntary agreement pursuant to the last sentence of Section 5(2)(f) of the act but regarding which the Commission has no power under existing law to impose requirements having longer duration than that specified in the second sentence of Section 5(2)(f) of the act." (R. 54).

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[1] The argument by the Department of Justice occupies 15 pages of the transcript, while the argument of counsel for the Interstate Commerce Commission and for the Railroad Intervenors each occupied but 8 pages.

[2] That is, the order under attack in this case.

In its brief in the court below the Department said:

> "It is clear from the face of Section 5(2)(f) that the Commission's construction is correct and that a different construction is not required." (p. 8).
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> "The section contains the clear and precise provision that the four-year period shall commence from the effective date of the order of approval. Had Congress intended that the period shall run from the date when the consolidation goes into effect or, as argued by plaintiff, from the date the employees are adversely affected, such words easily could and would have been used by Congress. Nor does the section give to the Commission discretion in applying a period other than four years from the effective date of the order of approval. The terminology in the statute is that the Commission *shall* include the four-year limitation therein provided. To provide a different period in the Commission's order would be contrary to the specific requirement imposed upon the Commission by the statute." (p. 9).

Further:

> "Congress deliberately fixed the period of protection to start from the effective date of the order and not the date an employee is adversely affected." (p. 18).

Finally, the brief concluded:

> "In the light of the clear unambiguous and specific language of Section 5(2) (f), its consistent interpretation and application by the Commission, since its enactment and over a long period of years, and the legislative history of the statute, the order of the Commission herein should not be disturbed." (p. 18).[3]

[3] It is interesting to observe that the answer and brief of the Department in the court below were signed, *inter alios*, by Herbert A. Bergson as counsel for the Department. Mr. Bergson now signs the Department's brief in this Court, which takes direct issue with those documents.

The same views were elaborated in oral argument of the Department. For example, counsel representing the Department argued:

> "It is our position, if the Court please, in this case that the statute in question is not ambiguous, and that the Commission has rendered a proper construction of a plain and unambiguous statute." (Tr. 33).
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> "Just assuming that the statute is not clear, and that we refer to the legislative history to see what the legislative intent was and is, when we do that I think without question that that shows that it was the clear intention of the legislature in writing this section of the statute to clearly define and limit the jurisdiction and the powers of the Commission to this specific four-year provision, and the whole legislative history and background, I think without question, clearly shows that." (Tr. 35).
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> "If you are going to rewrite the statute and say Congress didn't intend four years from the effective date of the order, that they didn't mean that; that they meant four years from the time the employees lose their jobs if they wanted to stay on, then that would add another four years at least to the statutory provision." (Tr. 44).

And again:

> "The statute is not ambiguous. It doesn't need any construction. In our opinion it is clear and as it is construed the four-year period limits the Commission to that extent.
>
> "But if you will look into the legislative history you are brass-riveted to the proposition that without question it was the intent of Congress that you limit them to that four-year period, and you can't read anything else into that statute." (Tr. 46).

If the Department is correct in its present position, its conduct in the court below can only be considered as entrapment of that court to enter an erroneous decree. We submit that the Department was right the first time.

The reasons advanced in the Department of Justice's brief against the Commission's interpretation of Section 5(2)(f) are, with one exception, the same reasons relied on by the plaintiff in the court below (appellant here). They have been fully dealt with in our main brief and do not require much discussion here. The Department of Justice has now adopted the basic fallacy of appellant's case, namely, that employees are not receiving protection from "being in a worse position with respect to their employment" when they are kept in their jobs at their full pay. Stated in another way, both appellant and the Department seem to think that it was the intent of Congress to give every employee affected by a transaction approved by the Commission under Section 5(2)(f) four years of dismissal or displacement pay. But the statute does not say so; indeed, it does not mention dismissal or displacement pay at all. Instead, it enjoins the Commission to take care that "during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment * * *." Is an employee who keeps his job at full pay for four years "in a worse position with respect to" his employment than if he had been fired at the effective date of the order and had thereafter drawn dismissal pay from the carrier? If the answer to this question is in the negative, and obviously it is, then plainly the only basis of the argument of appellant and the Department of Justice vanishes.

In its brief, the Department does advance one argument of its own in addition to those already made by appellant. This argument is that although Congress legislated in express words that the protective period should run four years from "the effective date" of the Commission's order, it did not really mean this but instead meant from the date an employee is displaced, and that therefore the court should strike the words "effective date" out of the statute

and substitute in their place the words "date an employee is displaced". The brief says:

> "The failure of Congress to anticipate the present contingency, and thus to use language which adequately dealt with it, does not prevent the Court from giving the words of the four-year clause the meaning which Congress obviously intended them to have." (p. 8).

The Department thus ascribes to Congress an intent different from the one which it expressed in clear words and asks this Court to legislate this supposed intent into the statute in substitution for the plain words of the statute. We do not believe that this Court will thus rewrite an act of Congress as now sought by the Department.

It is respectfully submitted that the interpretation of the statute made by the Interstate Commerce Commission, by the court below, and by the Department of Justice in the court below, is the correct one and that the interpretation urged in this Court by the Department contrary to the one it so strenuously insisted upon in the court below, is wholly incorrect.

Respectfully submitted,

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